



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 1972 OF 2013
CLEOPAS OOGA.....CLAIMANT
VERSUS
TRUFOODS COMPANY LIMITED.....RESPONDENT
JUDGMENT

Introduction

1. This action is brought by Cleopas Ooga, a former employee of Trufoods Company Limited. The claim is contained in a Memorandum of Claim dated 6th December 2013 and filed in Court on even date.
2. The Respondent filed a Memorandum of Response on 25th February 2015 and the matter proceeded to hearing with the Claimant testifying on his own behalf and John Chege Mwangi for the Respondent. The parties also filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent as a general worker from 1st August 2008 until 28th December 2010 when he was summarily dismissed. The Claimant claims that his dismissal was unlawful and unfair and that he was not paid his terminal dues.
4. The Claimant's claim is as follows:
 - a) A declaration that the termination of his employment was unlawful and unfair
 - b) An order for reinstatement
 - c) One month's salary in lieu of notice.....Kshs.10,993
 - d) Salary for 2011.....Kshs.103,328
 - e) Salary for 2012.....Kshs.116,748
 - f) Salary for 2013.....Kshs.131,916
 - g) House allowance for 2011.....Kshs.37,200

- h) House allowance for 2012.....Kshs.37,200
- i) House allowance for 2013.....Kshs.37,200
- j) Medical.....Kshs.51,600
- k) Arrears.....Kshs.25,128
- l) Damages for unfair termination of employment
- M) Certificate of service
- n) Costs plus interest

The Respondent's Case

5. In its Memorandum of Response dated 24th February 2015 and filed in Court on 25th February 2015, the Respondent states that the Claimant was dismissed for stealing goods destined for delivery to the Respondent's customers, Tuskys Supermarket and Maathai Supermarket in Thika.

6. The Respondent elaborates that on 23rd December 2010 the Claimant while on duty as the Respondent's custodian conspired to divert the goods to be delivered to the two supermarkets to Mwiki area where the goods were stolen and the Respondent's truck registration number KAL 463Z abandoned.

The Respondent reported the matter to Makongeni Police Station and Industrial Area CID office. The Claimant was charged with the offence of stealing following which he was dismissed for gross misconduct.

7. The Respondent denies that the Claimant's dismissal was unlawful or unfair and states that it does not owe the Claimant any money. The Respondent pleads that it was impracticable to hear the Claimant as he was detained in police custody for over a year.

Findings and Determination

8. There are two (2) issues for determination in this case:

- a. Whether the Claimant's dismissal was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Dismissal

9. The Respondent produced letter dated 29th December 2010 addressed to the Claimant as follows:

"Dear Cleopas,

It is with sincere regret that I must inform you that your employment at Trufoods Ltd has been summarily dismissed (sic) with effect from 24th December 2010.

As you are aware, on 23rd December you were given an assignment to accompany KAL 463Z a contracted truck together with the driver and another turn-boy. Your duty was you be the company custodian and ensure all the delivery documents and goods were delivered to Turkey's

(sic) Chania Branch and Maathai Supermarket. You together with the others conspired to divert the goods to Kasarani Mwiki area where the goods were stolen and the truck abandoned. We have

so far reported the matter to Makongeni police station and industrial area CID office is carrying out investigations.

Upon initial investigations the police have recommended for further prosecution in a court of law the process by which they are currently working on. (sic)

Considering that the Act (Theft by servant) amounts to gross misconduct as per the Employment Act 2007, which calls for summary dismissal, it is the Management's view that your employment in this Company can no longer be sustained. Consequently, you are hereby dismissed from the Company's employment on account of gross misconduct. While this type of discharge does not entitle you to any notice, you will however be paid the following:-

- i. Any days worked in this month i.e. up to 24th December 2010
- ii. Any leave due and not taken
- iii. LESS:- any loans/advances/monies you may have received from the Company

Upon receipt of this letter, you are required to surrender all Company items in your possession before your dues are cleared.

We wish you all the best for your future endeavors.

Sincerely,

(Signed)

John Chege Mwangi

HR & Administration Officer”

10. According to this letter, the Claimant was dismissed for collusion in the diversion of goods on transit to the Respondent's customers. The Claimant testified that on the evening 22nd December 2010, he was called by the Transport Supervisor, Patrick Munyalo who told him some goods had been dispatched to Thika on board a hired truck. Munyalo instructed the Claimant to proceed to Thika and collect the delivery notes from the customers. The Claimant confirmed from the customers that no deliveries were ever made.

11. The Respondent admits that the Claimant was not afforded any opportunity to respond to the charges leveled against him because he was in police custody for a year. However, according to an abstract from police records produced by the Respondent the matter was reported at Makongeni Police Station on 22nd January 2011, by which time the Claimant had been dismissed.

12. The Court therefore finds that the Respondent failed to establish a valid reason for dismissing the Claimant as required under Section 43 of the Employment Act, 2007. Additionally, in effecting the dismissal, the Respondent failed to adhere to the mandatory fairness requirements set out under Section 41 of the Act.

Remedies

13. Overall, the Court finds the Claimant's dismissal substantively and procedurally unfair and awards him six (6) months' salary in compensation.

In making this award I have taken into account the Claimant's length of service and the Respondent's conduct in the dismissal transaction. I further award the Claimant one (1) month's salary in lieu of notice

as well as salary for 24 days in December 2010.

14. The Court found no basis for the other claims set out in the Memorandum of Claim which are therefore dismissed.

15. Ultimately I enter judgment in favour of the Claimant in the following terms:

- a. 6 months' salary in compensation.....Kshs. 53,496
 - b. 1 month's salary in lieu of notice.....8,916
 - c. Salary for 24 days in December 2010.....7,133
- Total.....69,545**

16. This amount will attract interest at Court rates from the date of Judgment until payment in full.

17. I direct the Respondent to issue the Claimant with a certificate of service and to pay the costs of this case.

18. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31ST DAY OF MAY 2017

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JUDGE

Appearance:

Ms. Munyalo for the Claimant

Ms. Makori for the Respondent